71

(3)

FILED

OCT 24 2007

OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-81

IN THE

Supreme Court of the United States

EXXON MOBIL CORPORATION, ET AL.,
Petitioners,

v.

JOHN DOE I, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

WALTER E. DELLINGER
CHRISTOPHER H. SCHROEDER
O'MELVENY & MYERS LLP
1625 Eye St., NW
Washington, DC 20006
(202) 383-5300

PAUL W. WRIGHT
EXXON MOBIL CORPORATION
800 Bell Street
Houston, TX 77002

MARTIN J. WEINSTEIN *
ROBERT J. MEYER
JOSEPH G. DAVIS
WILLKIE FARR
& GALLAGHER LLP
1875 K St., NW
Washington, DC 20006
(202) 303-1000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
REASONS FOR GRANTING THE WRIT	4
I. THE DENIAL OF PETITIONERS' MOTION TO DISMISS ON POLITICAL QUESTION GROUNDS IS EFFECTIVELY UNREVIEWABLE AFTER FINAL JUDGMENT	4
A. The Foreign Policy Concerns Expressed by the Executive Branch and the Indonesian Government Are Implicated by the Continuation of this Lawsuit	4
B. The Remaining Claims Require Adjudicating the Blameworthiness of Indonesian Soldiers	6
C. Application of the Collateral Order Doctrine to this Case Is Consistent with this Court's Precedent	8
II. THE COURT OF APPEALS' RULING CONFLICTS WITH *SOSA* AND *ALTMANN*	11
CONCLUSION	13

TABLE OF AUTHORITIES

CASES	Page
767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugo., 218 F.3d 152 (2d Cir. 2000)	10, 11
Beaty v. Republic of Iraq, 480 F. Supp. 2d 60 (D.D.C. 2007)	12
Eckert Int'l, Inc. v. Fiji, 32 F.3d 77 (4th Cir. 1994)	11
First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759 (1972)	6
Mitchell v. Forsyth, 472 U.S. 511 (1985)	10
Republic of Austria v. Altmann, 541 U.S. 677 (2004)	3
Republic of the Phil. v. Marcos, 818 F.2d 1473 (9th Cir. 1987)	6
Sosa v. Alvarez-Machain, 542 U.S. 692 (2004)	3, 10
Van Cauwenberghe v. Biard, 486 U.S. 517 (1988)	9
Will v. Hallock, 546 U.S. 345 (2006)	10
Woods v. Interstate Realty Co., 337 U.S. 535 (1949)	11

IN THE

Supreme Court of the United States

No. 07-81

EXXON MOBIL CORPORATION, ET AL.,
Petitioners,

v.

JOHN DOE I, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The question presented is not, as Respondents argue, whether the collateral order doctrine should be "expanded." It is whether the traditional standards of the collateral order doctrine are satisfied when a court refuses to dismiss an action involving a foreign sovereign in the face of assertions by the Executive that the continued exercise of jurisdiction would have a serious adverse impact on significant U.S. interests.

The Court of Appeals determined that the first two requirements of the collateral order doctrine are met: the decision below conclusively determined an im-

portant issue separate from the merits of the litigation. At issue is whether the order is effectively unreviewable on appeal from the final judgment. That condition is met in this case.

The briefest review of this litigation demonstrates that any harms that flow from continued jurisdiction could not be cured by appeal from final judgment. Indonesia is the most populous Muslim-majority country in the world and rich in natural resources. Indonesia is a focal point for U.S. initiatives in the on-going war against Al Quaida and other dangerous terrorist organizations, and it plays a vital role in supplying natural resources and business opportunities to the United States. In reaction to this lawsuit, the Indonesian government has stated that it "cannot accept the extra territorial jurisdiction of a United States court over an allegation against an Indonesian government, cq the Indonesian military, for operations taking place in Indonesia" and that "continuation of the Lawsuit" is unacceptable. Informed by the Indonesian objections, on four occasions between 2002 and 2005, the United States warned that adjudication of the lawsuit would risk a potentially serious impact on the United States' ability to work with Indonesia on human rights issues, on the war on terror, and on foreign investments in the extractive industries.

The question of whether unacceptable damage to U.S. interests will result from continuation of this litigation calls for appellate review now. An appeal after judgment will be unable to repair the damage to U.S. interests caused by continuation of the litigation. Opportunities for constructive engagement with Indonesia in tracking down terrorists, improving human rights or in stimulating foreign invest-

ment that are lost or hampered during the pendency of the lawsuit cannot be restored once they are gone. As recently as February 2007, after the Court of Appeals' decision below, the Indonesian government "reaffirmed" its objections. Contrary to Respondents' contention, the United States government has not changed its position or indicated that it is "comfortable" with the litigation proceeding.

The cause for concern over this litigation of the Executive Branch and the Indonesian government was apparent to Judge Kavanaugh in dissent below: "[P]roof [of wrongdoing by the Indonesian military] is a necessary component of establishing either Exxon's vicarious liability for the alleged violent acts or Exxon's direct liability for negligently hiring the alleged bad actors." (App. 43a.) This fatal problem should have prompted dismissal of the entire case, but the District Court instead ruled that claims based on District of Columbia and Delaware law could proceed, notwithstanding that the case requires litigation of alleged acts of the Indonesian military against Indonesian citizens on Indonesia soil. The Court of Appeals would not revisit that conclusion because the Executive had not explicitly requested dismissal; its decision conflicts with this Court's direction that courts should give "serious weight," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), to the Executive Branch's view of a case's impact on foreign policy as the Executive's "considered judgment," *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004).

This case is hardly unique. The federal courts face growing numbers of claims like those in this case, alleging responsibility of U.S. corporations for acts by foreign governments abroad. When a district court

decides to permit a case like this to proceed after the Executive Branch has stated significant concerns with the continuation of the litigation, appellate review should be available to challenge that ruling.

REASONS FOR GRANTING THE WRIT

I. THE DENIAL OF PETITIONERS' MOTION TO DISMISS ON POLITICAL QUESTION GROUNDS IS EFFECTIVELY UNREVIEWABLE AFTER FINAL JUDGMENT.

A. The Foreign Policy Concerns Expressed by the Executive Branch and the Indonesian Government Are Implicated by the Continuation of this Lawsuit.

The objection to this litigation upon which the Executive based its statement of interest, and the principal objection of the Indonesian government, is that the litigation is an extraterritorial assertion of U.S. jurisdiction over the acts of a sovereign government. (App. 139a; 184a.) As the Executive stated, "We anticipate that adjudication of this case will be perceived in Indonesia as a U.S. court trying the GOI for its conduct of a civil war in Aceh." (App. 134a.) The Executive's Statement of Interest warned of the multiple ways in which the "adjudication" of the lawsuit could harm U.S. interests:

- "[t]his lawsuit . . . may also diminish our ability to work with the Government of Indonesia ("GOI") on a variety of important programs, including efforts to promote human rights in Indonesia";
- "This lawsuit could potentially disrupt the ongoing and extensive United States efforts to

secure Indonesia's cooperation in the fight against international terrorist activity"; and

- "This litigation appears likely to further discourage foreign investment," which "in turn could have decidedly negative consequences for the Indonesian economy," "in conflict with" a number of important U.S. goals and policies.

(App. 133a-138a.) In a February 2007 diplomatic note to the State Department, Indonesia "reaffirmed" its opposition to the litigation on sovereignty grounds. (App. 185a.) It also lamented that the litigation would risk the hard-won peace that has finally come to Aceh. (App. 186a.)

Respondents invite the Court to conclude, from silence, that the Executive has spontaneously withdrawn its concerns about the lawsuit. (Opp'n 6-7, 17.) However, the record shows consistent statements by the Executive warning of the "potentially serious adverse impact on significant interests of the United States" posed by adjudication of the lawsuit. (App. 133a, 142a, 166a, 173a, 174a, 183a.) There is nothing in the record withdrawing those statements, and no statement from the United States that it is now "comfortable" with the litigation.

Respondents take out of context an Assistant United States' Attorney's remarks from a December 2005 hearing. (Opp'n 6-7.) These remarks were mere courtesies at the end of a brief hearing, and were made at a time when the federal claims had been dismissed, no complaint was pending, no discovery plan was in place, and Respondents had yet to move to amend their complaint. The Executive has repeatedly stated its position, and it is inappropriate to accept Respondents' invitation to draw conclusions

from the absence of additional confirmations of that position.[1] *See First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764 (1972); *Republic of the Phil. v. Marcos*, 818 F.2d 1473, 1488 n.20 (9th Cir. 1987). It is particularly inappropriate to draw conclusions from silence when the District Court has ordered Petitioners not to raise justiciability as a defense to any amended complaint. (District Court Docket No. 118 at 1.)

B. The Remaining Claims Require Adjudicating the Blameworthiness of Indonesian Soldiers.

As Judge Kavanaugh recognized (App. 43a), to prevail at trial, Respondents must prove that the Indonesian military committed the acts for which they seek to hold Petitioners liable. (District Court Docket No. 129-2 ¶¶ 1, 58-62, 67-77.) In the words of Respondents' counsel in May 2005, referring to two of the Respondents:

> They were killed by the Indonesian military, and we will shortly amend the complaint to add those allegations. They were killed by the military, we believe, that were operating on behalf of Exxon Mobil, as the other plaintiffs were injured.

(App. 171a.) When asked to react to Respondents' position, the Assistant United States Attorney stated:

> I heard them say that the killings were done by the Indonesian military, and that they plan to

---

[1] The Executive and Legislative Branches have recently confirmed their strong support for the peace process in Aceh. *See* November 20, 2006 Joint Statement Between the United States and the Republic of Indonesia, *available at* http://www.whitehouse.gov/news/releases/2006/11/20061120-3.html; *see also* H.R. Res. 238 (passed September 17, 2007).

> amend the complaint to add a claim regarding that. That's exactly the concern that underlies Mr. Taft's letter.

(App. 174a.)

Against this backdrop, Respondents' related suggestions that this litigation is merely a private dispute between themselves and "Exxon security personnel" (Opp'n 2); that the District Court has dismissed any claim that "would have required adjudication of actions taken by the Indonesian government" (Opp'n 14); that the implications of this case for U.S. foreign policy are factual issues "'enmeshed in the merits of the dispute'" and therefore inappropriate for resolution under the collateral order doctrine (Opp'n 18-19 (citation omitted)); or that the Indonesian government and the State Department are now "comfortable" with the case because of the restrictions on discovery imposed by the District Court (Opp'n 7) are not well founded. As the State Department observed, "All of the human rights abuses and injuries alleged in the complaint refer to conduct claimed to have been committed by the military and police forces of the GOI." (App. 134a-135a.) In fact, two days after it filed its opposition to certiorari, Respondents filed a motion in the District Court seeking to compel Petitioners to provide testimony regarding specific details of Indonesian military deployments and movements. (District Court Docket No. 227-2 at 11-12 (moving to compel testimony of Petitioners' Fed. R. Civ. P. 30(b)(6) witness regarding "[p]atrols or sweeping conducted by the armed forces, police forces, or any other person, corporation, or individual providing security at the Arun Project" for thirteen specified times and locations).) There is nothing "fact-bound"

(Opp'n 2) about the direct and inescapable conclusion that Respondents' claims cannot be addressed without making findings about the actions of the Indonesian government and military.

C. Application of the Collateral Order Doctrine to this Case Is Consistent with this Court's Precedent.

Respondents' arguments in support of their assertion that dismissal of Petitioners' appeal was required by this Court's precedent (Opp'n 12-19) do not withstand scrutiny. Respondents argue (1) that the rule advanced by Petitioners is unacceptably dependent on the facts of a particular case and cannot be properly "categor[ized]" for purposes of the collateral order doctrine (Opp'n 13-14); (2) that in this case the factual analysis is tied to, and inseparable from, the merits of the underlying claims (Opp'n 17-19); and (3) that only a "claim of right" can satisfy the collateral order doctrine, and that Petitioners do not have a "claim of right," because "[i]f any 'right' is implicated here, it belongs to the United States, not to Exxon," (Opp'n 14-17.) None of these arguments is persuasive.

For the reasons set out above, the proposed category of cases suitable for review under the collateral order doctrine is neither inappropriately dependent on the facts nor inseparable from the merits. The category of claims that would and do fit within the Court's collateral order jurisprudence are claims against U.S. entities involving the acts of foreign sovereigns abroad that the Executive Branch believes should not be litigated due to the harm to significant U.S. interests that would arise from the litigation process. Where, as here, the Executive concludes

that a claim cannot be litigated without creating the risk of a serious adverse impact on significant foreign policy interests of the United States, the collateral order doctrine should provide a direct appeal of the denial of a motion to dismiss on political question grounds, because the risk identified by the Executive cannot be avoided or corrected on appeal after judgment. The questions Respondents pose about "[h]ow clear and strong must the warning be" (Opp'n 13) go to the merits of the political question claim; they do not relate to whether the denial of a motion to dismiss on political question grounds may be appealed. *See Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) (the question "is not whether petitioner's underlying claim of immunity is meritorious, but whether the denial of petitioner's motion to dismiss on grounds of immunity from service of process is immediately appealable.").[2]

Respondents also contend that only a "claim of right" can satisfy the collateral order doctrine, and that Petitioners do not have a "claim of right," because "[i]f any 'right' is implicated here, it belongs to the United States, not to Exxon." (Opp'n 14-17.) This theory is misguided. First, Petitioners are the

---

[2] Respondents' contention that the court of appeals "was mistaken in ruling that the political question issue is completely separate from the merits of respondents' claims against Exxon" (Opp'n 17) cannot be reconciled with their claims. As every court to examine this case has concluded, Petitioners' liability is entirely dependent on an evaluation of the acts of the Indonesian military. Whether the allegations actually have merit or not is irrelevant; under any set of facts and circumstances, in order to adjudicate Respondents' claims, the parties will have to establish facts concerning the actions of the Indonesian soldiers alleged to have committed tortious acts, and the court and trier of fact will have to make judgments about those actions.

parties below and are entitled to bring the views of the Executive to the courts' attention. Second, the collateral order doctrine does not hinge on individual claims of right, but on the nature of the interest that underlies the right asserted. As Respondents acknowledge (Opp'n 13), the collateral order doctrine applies to categories of orders that may affect a "substantial public interest." *See Will v. Hallock*, 546 U.S. 345, 353 (2006). For example, in absolute immunity cases, there is a substantial public interest "rooted in the separation of powers." *Id.* at 352. Similarly, a government official who invokes the collateral order doctrine to protect his claimed right to qualified immunity does so not only to avoid trial for himself, but to protect the public interest in having government officers comforted by the knowledge that an immediate appeal will be available whenever district courts deny their immunity defenses. *See Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985) (discussing rationale for qualified immunity). It is the "particular value of a high order" that matters under the collateral order doctrine, not the interest of the defendant in "mere avoidance of trial." *Will*, 546 U.S. at 352. Here, the value of high order is deference to the Executive's view of the impact of the case on foreign policy. *See Sosa*, 542 U.S. at 733 n.21.

Unlike the Court of Appeals below, the Second Circuit agrees that a case such as this is subject to the collateral order doctrine. In *767 Third Avenue Associates*, the Second Circuit reviewed the district court's failure to dismiss a lawsuit despite concerns offered by the State Department about the effect of the litigation on U.S. foreign policy interests. *767 Third Ave. Assocs. v. Consulate Gen. of Socialist Fed. Republic of Yugo.*, 218 F.3d 152, 159 (2d Cir. 2000).

Respondents argue that *767 Third Avenue Associates* is inapposite, because the Second Circuit concluded that the district court's order was appealable under the abstention-based stay order doctrine. (Opp'n 11-12.) However, the Second Circuit also held that the denial of the motion to dismiss on political question grounds was "a holding that 'conclusively determines an issue that is separate from the merits,' and is therefore *also* appealable under the collateral order doctrine." *767 Third Ave. Assocs.*, 218 F.3d at 159 (citation omitted) (emphasis supplied). The Second Circuit's alternative holdings each have separate precedential value, *see Woods v. Interstate Realty Co.*, 337 U.S. 535, 538 (1949), one of which is in conflict with the decision below.[3]

II. THE COURT OF APPEALS' RULING CONFLICTS WITH *SOSA* AND *ALTMANN*.

Respondents do not dispute that cases such as theirs, which seek to litigate extraterritorial claims of noncitizens regarding the conduct of foreign governments, are increasingly common. (Pet. 23-26; Opp'n 21-22.) In light of this trend, it is particularly significant that the decision below departs from this Court's guidance in *Sosa* and *Altmann* on the deference owed to Executive statements of interest. (Pet. 17-22.)

Respondents' attempts to justify the decision below under *Sosa* (they do not cite *Altmann*) fail. As discussed above, positions taken by the United States clearly and directly opine that the conduct of this

---

[3] *Eckert International, Inc. v. Fiji*, 32 F.3d 77 (4th Cir. 1994), cited by Respondents, is irrelevant here because there was no Executive statement of interest in that case.

litigation threatens significant U.S. interests. The majority below clearly distinguished between the statement of interest submitted in this case, which it interpreted as "a word of caution to the district court," and a hypothetical statement of interest that provides "an unqualified opinion that this suit must be dismissed." (App. 17a.) The court then directly equated a letter that "unambiguously requests that the district court dismiss a case as a non-justiciable political question" with the *Sosa* standard (by citing *Sosa*), and suggested that "the letter before us in the record" was not such a letter and therefore not entitled to the deference required under *Sosa*. (App. 18a.) Nothing in *Sosa* or *Altmann* suggested that deference is contingent on an Executive request for dismissal, and *Sosa*'s reference to the statement of interest in the *South African Apartheid* litigation—which did not contain an express request for dismissal—demonstrates the error in the majority's approach. (Pet. 18-20; App. 193a-196a.)

Beaty v. Republic of Iraq, 480 F. Supp. 2d 60, 82 (D.D.C. 2007), which Respondents fail to address, is the best evidence that the opinion of the Court of Appeals, if left standing, will lead courts to conclude that the *Sosa* standard does not apply to statements of interest unless they expressly request dismissal.

In light of the growing trend by noncitizens using United States courts to challenge foreign governments' actions, the peculiar decision of the majority below under the wrong appellate review standard is another reason to grant the writ.

CONCLUSION

Petitioners request that the petition for a writ of certiorari be granted.

Respectfully submitted,

WALTER E. DELLINGER
CHRISTOPHER H. SCHROEDER
O'MELVENY & MYERS LLP
1625 Eye St., NW
Washington, DC 20006
(202) 383-5300

PAUL W. WRIGHT
EXXON MOBIL CORPORATION
800 Bell Street
Houston, TX 77002

MARTIN J. WEINSTEIN *
ROBERT J. MEYER
JOSEPH G. DAVIS
WILLKIE FARR
& GALLAGHER LLP
1875 K St., NW
Washington, DC 20006
(202) 303-1000

* Counsel of Record

October 23, 2007